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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

NO. 657

KANSAS CITY SOUTHERN RAILWAY CO.,

Petitioner

—Against—

PAUL JOHNSTON

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT AND OPINION OF THE SUPREME COURT OF THE STATE OF OKLAHOMA

CLYDE J. WATTS
219 Couch Drive
Oklahoma City, Oklahoma

King Law Brief COMMERCE EXCHANGE BLDG., OKLAHOMA CITY — CE 2-2908

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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

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APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. CONSTITUTION, AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U. S. CONSTITUTION, AMENDMENT XIV, SECTION 1. Citizenship; Privileges and Immunities; Due Process.

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OKLAHOMA CONSTITUTION—

> MISCELLANEOUS, ART—XXIII, SECTION 6, CONTRIBUTORY NEGLIGENCE.

The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury.

TITLE 28, USC 1257, SECTION (3): State Courts; Appeal; Certiorari.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3). By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

TITLE 28, USC 2101 (c), (f) : Time for Appeal or Certiorari

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for a good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139 § 106, 63 Stat. 104.

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Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

TITLE 45, USC, PAR 2. Federal Employees Liability Act; Faulty Safety Appliances; etc.

§ 2. Automatic couplers

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. Mar. 2, 1893, c. 196, § 2, 27 Stat. 531.

TITLE 45. USC, CHAPTER 2, PAR. 51. Federal Employees Liability Act

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 53 Stat. 1404.

TITLE 45, USC, CHAPTER 2, PAR. 53. Federal Employees Liability Act, Contributory Negligence.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

APPENDIX B

PORTIONS OF PLEADINGS, OPTIONS JUDGMENTS AND DECREES

PLAINTIFF'S PETITION, PARAGRAPHS IV, V, VII, and IX:

IV.

This suit and cause of action is brought pursuant to the Safety Appliance Act, Title 45 U.S.C.A., Sec. 2; towit:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

Pursuant to the foregoing

V.

Pursuant to the foregoing statute and the decisions of the United States Supreme Court, the defendant, at all times mentioned herein, had the absolute duty to haul or use on its line cars equipped with couplers which, after a secure coupling was effected, would remain coupled until set free by some purposeful act of control.

VI.

On March 16, 1963, at about 8:05 A.M., plaintiff was performing his duties as a conductor on defendant's freight train designated as Extra 102 North. Plaintiff took up his duties at DeQueen, Arkansas, in defendant's caboose No. 367. Defendant's train at the above mentioned time and place consisted of 124 cars securely coupled and loaded with 6,919 tons of ore and other merchandise being transported in interstate traffic

VII.

As defendant's train, Extra 102 North, approached a point known as Rich Mountain, Arkansas, a knuckle broke on car No. 79514-XC-KC which car was located approximately 14 cars from the head end. The knuckle on this car was repaired and securely coupled to the rest of the cars. An attempt was then made to move approximately 85 cars of defendant's train which was located on the south side of Rich Mountain. On this occasion, a knuckle broke on car No. DSDX-5040-XB-KC, which car was about 27 cars from the engine. This knuckle was subsequently repaired and, after various switching movements, the cars in defendant's train were again securely coupled.

VIII

Denfendant's engineer started the train down Rich Mountain and reached a speed of approximately 40-45 miles per

hour upon approaching Howard, Arkansas. When defendant's engine reached a point located about Milepost 363 the engine crew on defendant's train Number 15, standing on an adjoining track, warned plaintiff's crew that defendant's train had broken in two units about 30 cars ahead of the caboose. As a direct and proximate consequence of the cars becoming uncoupled, the brakes at the head end of the train went into emergency at the same time the engine's dynamic brakes were being applied. This caused the head end to slow down more rapidly than the rear end of defendant's train with the result that the rear unit collided with the head end with great force and violence. As a result of the collision, plaintiff sustained severe and permanent injuries as hereinafter more specifically described.

IX.

The aforesaid occurrence and resulting injuries to plaintiff were directly and proximately caused by the defendant's breach of the Safety Appliance Acts, particularly Title 45 U. S. C. A., sec. 2.

ANSWER OF DEFENDANT RAILROAD, PARAGRAPHS II, III, IV, V:

II.

This defendant denies that its equipment was not equipped with couplers that were automatic and would couple by impact and which could be uncoupled without the necessity of men going in between the ends of cars, and specifically alleges

that each and every car of the defendant had couplers automatically coupling on both A and B end of all cars and by reason thereof the plaintiff herein cannot allege any failure of this defendant to comply with the Safety Appliance Act. That further it was not necessary that the plaintiff go in between any cars of this Railroad and that, therefore, the Safety Appliance Act becomes inapplicable to the injuries and damages claimed by the plaintiff herein.

III.

For further answer and defense, this defendant alleges and states that they were in nowise negligent in the operation of this train or in the conduct of their business and more in particular in any breach of the Safety Appliance Act, particularly Title 45 USAC, Sec. 2, and therefore, defendant cannot be responsible to plaintiff in damages under said Act.

IV.

For further answer and defense, this defendant alleges that if plaintiff was injured, which is not admitted, that it was due to an unavoidable casualty or misfortune, over which this defendant had no control, and that this defendant acted in all premises without negligence, by reason of which unavoidable casualty the plaintiff cannot recover herein.

V.

For further answer and defense, this defendant alleges that it was confronted with a sudden emergency, and that in its action in said sudden emergency it acted as an ordinary

prudent person would do under similar and same circumstances, by reason of which the plaintiff cannot recover herein.

WHEREFORE, defendant prays that plaintiff take nothing by reason of his petition filed herein and this defendant go without cost.

LOONEY, WATTS, LOONEY, NICHOLS & JOHNSON
By Burt Johnson

(CERTIFICATE OF MAILING ATTACHED)

Filed in LeFlore County, Poteau, Okla. July 8, 1964
Bill Rockwell, Court Clerk by Idus Baird, Deputy.

IN THE DISTRICT COURT FOR LEFLORE COUNTY, STATE OF OKLAHOMA

No. 18654

PAUL JOHNSTON,

Plaintiff

VERSUS

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a Corporation,

Defendant.

MOTION TO STRIKE

Comes now the plaintiff, Paul Johnston, and moves the Court to strike the following matter from the answer of the defendant filed herein:

1. The last sentence of paragraph '". which reads as follows.

"That further it was not necessary that the plaintiff go between any cars of this Railroad and that, therefore, the Safety Appliance Act becomes inapplicable to the injuries and damages claimed by the plaintiff herein."

2. All of Paragraph III, which reads as follows:

"For further answer and defense, this defendant alleges and states that they were in no wise negligent in the operation of this train or in the conduct of their business and more in particular in any breach of the Safety Appliance Act; particularly Title 45 USAC, Sec. 2, and therefore, defendant cannot be responsible to plaintiff in damages under said act."

3. All of paragraph IV, which reads as follows:

"For further answer and defense, this defendant alleges that if plaintiff was injured, which is not admitted, that it was due to an unavoidable casualty or misfortune, over which this defendant had no control, and that this defendant acted in all premises without negligence, by reason of which unavoidable casualty the plaintiff cannot recover herein."

4. All of paragraph V, which reads as follows:
"For further answer and defense, this defendant alleges that it was confronted with a sudden emergency, and that in its action in said sudden emergency it acted as an ordinary prudent person would do under similar and same circumstances, by reason of which the plaintiff cannot recover herein."

VARNER & MILLER

By Dick Miller II,
Attorneys for the Plaintiff

FILED IN LEFLORE COUNTY
POTEAU, OKLAHOMA

July 13, 1964

(Certificate of mailing attached).

BILL ROCKWELL, COURT CLERK

ANSWER OF DEFENDANT:
PRE TRIAL CONFERENCE ORDER OF COURT
SUSTAINING PLAINTIFF'S MOTION TO STRIKE

ANSWER OF DEFENDANT:

IN THE DISTRICT COURT WITHIN AND FOR
LEFLORE COUNTY, OKLAHOMA

No. 18654

PAUL JOHNSTON,

Plaintiff

VERSUS

KANSAS CITY SOUTHERN RAILWAY COMPANY, a Corporation,

Defendant.

PRE-TRIAL CONFERENCE ORDER

On this 12th day of February, 1965, the above cause came on for pre-trial, the Honorable George Windham, District Judge, presiding: Messrs, Varner & Miller, Attorneys, Poteau, Oklahoma, appearing on behalf of the plaintiff; and Mr. Johnson, of Looney, Watts, Looney, Nichols & Johnson, of Oklahoma City, Oklahoma, appearing on behalf of the defendant.

WHEREUPON, the following proceedings were had;

The motion to strike paragraphs 4 and 5 of the answer was presented and argued to the Court.

THE COURT; The motion to strike is sustained.

MR. JOHNSON: To which the defendant excepts.

MR. JOHNSON: We would also like to amend our answer to this extent: To make the allegations that the railroad was equipped with standard equipment used in the industry; that they had been used with proven tests and competency for the handling of train movements on this particular railroad for a period of time.

MR. VARNER: That's the same thing, your Honor.

(Statements of counsel)

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 41569

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a Corporation.

Plaintiff In Error,

VERSUS

PAUL JOHNSTON,

Defendant In Error.

SYLLABUS

1. The prohibition in Sec. 2 of The Safety Appliance Acts (27 Stat. 531, 45 USCA, § 2) against a common carrier "engaged in interstate commerce by railroad" hauling or using "on its line any car moving interstate traffic not equipped with" automatic couplers, is not confined to switching operations.

2. The above cited Federal enactment requires couplers which, after a secure coupling is effected, will remain coupled until set free by some purposeful act of control, and the carrier's duty to have such couplers on its cars is absolute. Consequently, the trial court committed no reversible error in overruling the defendant carrier's objection to that portion of plaintiff counsel's opening statement in which he so informed the jury.

3. Where, as the result of train couplers' failure to remain so coupled, the train separated, and there was no question but that its conductor was injured by the jolt, or impact, from the collision between the train's two, or more, separated parts, and there was no proof as to the cause of the coupler's failure, the trial court committed no error in sustaining said plaintiff conductor's motion for an instructed verdict against the railway company defendant.

4. Where the defendant company did not request that the jury be given appropriate instructions as to the effect of contributory negligence in the present case, the trial court committed no error in omitting such instructions.

5. A verdict will not be set aside on account of an irregularity in the selection of the jury, absent a showing of prejudice to the party complaining thereof.

6. Where, in its appeal, after a judgment based on a verdict against it, a defendant company complains that ,after one of the jurors had indicated, on voir dire examination, some doubt as to whether he could be fair in his consideration of the case, the court did not interrogate him to determine whether he should be excused for cause, but the record shows that defense counsel thereafter interrogated him extensively, apparently satisfied himself that the juror would be fair, and did not challenge him peremptorily, the trial court's said inaction constituted no cause for reversal, in the absence of a showing of prejudice to defendant therefrom.

7. On appeal, after an adverse verdict and judgment, a defendant cannot successfully urge error in the trial court's permitting plaintiff to elicit from witnesses on direct examination testimony of the same character elicited by defendant on cross examination, and relied upon by it in attempting to establish a defense to the action and to obtain it's new trial on the merits.
8. It is not the duty of the Supreme Court to order a judgment, based upon a verdict, set aside or reduced on appeal on account of assignments of error not supported by the citation of authority, unless it is apparent, without further research, that they are well taken.

APPEAL FROM THE DISTRICT COURT OF LEFLORE COUNTY.

HON. GEORGE WINDHAM, District Judge.

Action, under one of The Safety Appliance Acts, by a conductor on one of a railway company's freight trains, as plaintiff, against the Company, as defendant, for damages on account of his personal injuries from a collision of some of the train's cars, after they became uncoupled. After judgment based on a verdict for plaintiff, defendant appeals.

AFFIRMED

LOONEY, WATTS, LOONEY, NICHOLS AND JOHNSTON, Oklahoma City, *For Plaintiff In Error,*

VARNER AND MILLER, Poteau, *For Defendant In Error.*

BLACKBIRD, J.:

This appeal involves an action for damages for personal injuries suffered by defendant in error, hereinafter referred to

as "plaintiff", in an accident on the main line of plaintiff in error's railroad, allegedly caused from the latter's violation of section 2 of one of the Acts Of Congress known as "The Safety Appliance Acts" (27 Stat. 531; 45 USCA, S 1, et §).

On the date of the accident, March 16, 1963, plaintiff was a railway train conductor for plaintiff in error, hereinafter referred to as "defendant", on said defendant's freight train designated as "Extra 102 North". The train, composed of seven diesel unit locomotives, 124 freight cars, and a caboose was en route from Mena, Arkansas, to Heavener, Oklahoma. Plaintiff boarded the train to start his tour of duty at DeQueen, Arkansas, just before 3 A.M. that day. When the train had traveled in a northerly direction and was descending Rich Mountain about two hours later, some of its cars became uncoupled at a point, or points, behind the locomotives and ahead of the caboose, thus separating the train into at least two sections. When this occurred near a communication station on said railroad, known as "Howard, Arkansas", emergency braking of the first section, or head end, of the train, occurred, and the air brake hose line having severed itself where the separation of the train occurred, the last section of the train sped down the steep grade and collided with the train's head section. The impact of the collision jolted plaintiff out of his seat in the caboose and injured him.

When plaintiff thereafter commenced this action for damages against defendant in 1964, his petition alleged, among other things, that under the Safety Appliance Act, supra, and "the decisions of the United States Supreme Court", defendant had the "absolute duty" to use on its line cars equipped with couplers that "would remain coupled until set free by some purposeful act of control," and further alleged that the accident and his resulting injuries were directly and proximately caused by defendant's "breach" of said Act, particularly its section 2 or "automatic coupler" section.

Plaintiff's petition also alleged that his injuries from the collision consisted of the aggravation of a previous lumbar spinal injury, injuries to his spine, disks, spinal cord, hip, right leg and testicle, ligaments, nerve roots and muscles. In his petition, plaintiff prayed for the lump sum of $200,000.00 for loss of earnings, hospital and medical expense, past and future pain and suffering, permanent impairment, and loss of earning capacity.

Defendant's answer consisted of a qualified general denial, and, in paragraph "II" thereof, it denied that the cars of the train were not equipped with automatic couplers that would operate by impact and could be uncoupled without men going between the cars to do this, and affirmatively alleged that all of the cars were so equipped, and that, for this reason, the Safety Appliance Act was inapplicable to the accident. In paragraph "III" of its answer, defendant further alleged, on

the basis of its denial of negligence in the operation of the train and conduct of its business and more particularly in any breach of the Safety Appliance Act, that said Act was not applicable: In paragraphs "IV" and "V" of its Answer, defendant alleged that plaintiff's injuries, if any, were due to an unavoidable casualty or misfortune and that, under the circumstances of the accident, it was confronted with a sudden emergency.

At the pre-trial conference on the case, the Court, on plaintiff's motion, ordered paragraphs IV and V stricken from defendant's answer, and it was stipulated, among other things, that plaintiff had a life expectancy of 28.67 years.

When the case finally came to trial in March, 1965, plaintiff's counsel, during his opening statement, promised the jury that the court would tell them that, under the Safety Appliance Act, all the plaintiff had to prove was that the train came apart, and, as a result, plaintiff was injured. He continued his statement in the following words:

> We don't have to show why, as to whether or not the Railroad will be permitted to explain why, that's a question for the Court. But whether they do or don't, we would like you to bear in mind this is a case of absolute liability by the Railroad and has resulted in Mr. Johnston's being hurt,—"

At this point, counsel for defendant objected that plaintiff's counsel was "mis-stating a point of law", but the Court over-

ruled the objection, and plaintiff's counsel continued his opening statement.

Whether all of the train's 124 cars were pulled up the south side of Rich Mountain in one train, or section, does not appear absolutely clear from the evidence. There is an indication in plaintiff's testimony, however, that the length of the train was "doubled" when it left a point just below, or north, of the top of said mountain referred to as "North Switch"; but, be that as it may, when the train left that point to continue its trip down the north side of the mountain, all the cars were "coupled up" (presumably as one train), according to the testimony of Milburn Duncan, who was acting as the train's "Rear brakeman or flagman". It was established that, as the train left north switch, while Duncan was standing on the road bed on one side of the train, and plaintiff was standing on the other side, they made a "running inspection" of the train as it was propelled past them to see that all of the cars were coupled before again boarding the train at its rear end, or caboose, for the rest of the journey down the mountain toward Howard. As the separation occurred only 6 miles farther down the track, without any eye witnesses as to its cause, and the cars were all found to be coupled back together when the train stopped after the collision, defense counsel interrogated plaintiff and other train crewmen testifying as witnesses for him, as well as a Mr. Malone, who was the only

witness called by the defense, in an effort to elicit an axplanation as to what caused the cars to come uncoupled. The witnesses testified as to various things that could have happened, as the train proceeded down the mountain that night possibly have caused the couplers to uncouple, but there was no evidence whatsoever that any of these things *did happen.*

By the cross examination of most of the witnesses, defense counsel made the proof positive that the separation, or uncoupling, did not occur during any switching operations, and defendant's theory that the Safety Appliance Act therefore did not apply, was one of the stated grounds for the demurrer to plaintiff's evidence it thereafter interposed. After this demurrer was overruled and the members of the jury, at defendant's request, had been taken to a railroad side track to view couplers on a railroad car there, and defendant's only witness, Malone, had testified, and defendant had rested, the court sustained a motion by the plaintiff, over defendant's objections, to instruct the jury that, under the evidence as presented, the defendant, was liable "for whatever damages the plaintiff may have sustained . . . ." Accordingly, the case was thereafter submitted to the jury for the sole purpose of fixing the amount of plaintiff's recovery. After deliberating this matter, the jury returned a general verdict in plaintiff's favor for a lump sum of $79,500.00, and judgment was rendered in accord therewith. After the overruling of its motion for a new trial, defendant perfected the present appeal.

The trial court's claimed errors referred to in the first two of defendant's propositions for reversal, and a part of its third one, are its overruling of defendant's objection to the hereinbefore quoted portion of plaintiff counsel's opening statement and said court's ruling on plaintiff's motion for an instructed verdict, which had the effect of fixing defendant's responsibility for the train's separation and subsequent "run-in", or collision, and plaintiff's resulting injury, without affording any opportunity for a jury determination as to what caused the offending couplers to come uncoupled. Defendant's grounds for claiming error in these rulings may be summarized as follows:

(1) The Safety Appliance Act was not intended to cover the failure of automatic couplers to remain coupled during a train's movement on a main line in transit between two cities on a regular run, and having nothing to do with switching operations.

(2) After the court and jury heard testimony from the plaintiff, as well as his witnesses, Ray and Duncan, and the defense witness, Malone, that freight cars may become uncoupled from a draw bar breaking, or being pulled out, or from "busting" knuckles, or pins slipping, and on some occasions this has resulted from pin lifters being activated from various causes like an angle bar or something else falling off of a car and that, or a rock, animal, or some other foreign object being flipped up from the road bed by the train's wheels and hitting the pin, or air hoses breaking and swinging around and striking the pin, or by a rough track causing cars to bounce up and down and pins to raise up, the court should have allowed the jury to determine the cause of the

> uncoupling and train separation, as a matter of fact, rather than determining, as a matter of law, that defendant was liable, as if the offending couplers were defective, regardless of the possibility of their having become uncoupled from some cause for which defendant could not be held responsible.

Defendant's arguments *are both novel and unsound.* It's citations of cases involving switching operations conspiciously omit *Minneapolis & St. Louis Railroad Company vs. Gotschall* 244 U. S. 66, 375 S. Ct. 598, 61 L. ed. 095, cited by plaintiff. The Gotschall case involved the trip of a freight train transporting interstate commerce merchandise from Albert Lee, Minnesota, to Minneapolis. (In connection with defendant's contention that the Safety Appliance Act does not cover "through" trips, as distinguished from "switching operations", see the discussion of the Gotschall and other cases in *Kernan vs. American Dredging Co.,* 355 U.S. 426, 78 S. Ct. 394, 2 L. ed. 2d 382, 389-392). As far as any of the official reports of that case reveal, that trip was not a switching operation, and there is no intimation that it was ever so considered. In its reply brief, defendant says that in the Gotschall Case, the United States Supreme Court "looked with favor" upon the question of the defendant Railroad's responsibility for the involved brakeman's death being submitted to a jury. When that case was first tried by a Minnesota district court, a verdict was directed for the defendant railroad, but apparently that court set aside the directed verdict and granted plaintiff a new trial, which said ruling was affirmed in the first appeal of

the case. See *Gotschall vs. Minneapolis & St. L. R. Co.*, 125 *Minn.* 525, 147 *N.W.* 430. After a second trial, in which the case was submitted to a jury and a verdict was returned for the plaintiff, the Railroad again appealed. See *Gotschall vs. Minneapolis & St. L. R. Co., Minn.*, 153 *N.W.* 120. The last cited report reveals that the deceased brakeman's death was attributed to the train's coming apart, because of the circumstance that his body was thereafter found "several car lengths south of the north end of the rear portion of the separated train . . .". If the evidence connecting the brakeman's death with the train's separation was purely circumstantial, that was reason enough (aside from the question of the Railroad Company's responsibility for the train's coming apart) for submitting that case to a jury. But, here, that is not the situation. Here there is no question, or issue, of plaintiff's having been injured as a result of the separation of Extra 102 North. This was proved by uncontradicted, direct evidence, and was not merely a matter that might, or might not, be reasonably inferred, from circumstantial evidence, by a jury.

Nor was there any question, or issue here of defendant's liability to be submitted to the jury, because of different conclusions that might have been drawn from the evidence as to the cause of the couplers' failure to hold, or remain closed, at all times after the train left North Switch. Plaintiff relies heavily on *O'Donnel vs. Elgin, Joliet & E. R. Co.*, 338 *U.S.* 384 *S. Ct.* 200, 94 *L. ed.* 187, in which the court held:

> "The Safety Appliance Act (42 USCA § 2), which makes it unlawful for a common carrier engaged in interstate commerce to use cars 'not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the end of the car', requires couplers which, after a secure coupling is effected, *will remain coupled* until set free by some purposeful act of control." (Emphasis added).

In the process of reaching its announced conclusion in the O'Donnell Case that, as to a claim based on the Safety Appliance Act (as Johnston's petition in this case shows his is—without any allegation of negligence) the plaintiff is "entitled to a preemptory instruction" that, to equip a car with a coupler that breaks, is a violation of the Act, which renders the defendant railroad liable for injuries approximately resulting therefrom, the court said:

> A defendant cannot escape liability for a coupler's inadequacy by showing that too much was demanded of it, nor by showing that while the coupler broke it had been properly manufactured, diligently inspected and showed no visible defects. These circumstances do go to the question of negligence; but, even if a railroad should explain away its negligence, that is not enough to explain away its liability if it has violated the Act."

In a footnote to the quoted statement, the Court also said:

> "We do not say that a railroad may never effectively defend under the Act my showing that an adequate coupler failed to hold because it was broken or released through intervening and independent causes other than its inadequacy or defectiveness; such, for example, as the work of a saboteur. * * *."

Defendant seizes upon the quoted language in the footnote to support its position that the testimony of the witnesses, Ray, Duncan and Malone, above referred to, was sufficient evidence that the couplers in this case failed to remain coupled because of causes independent of, or aside from any inadequacy, or defectiveness, in them. The testimony referred to was not to the effect that the couplers in this case failed to remain coupled because of any circumstance mentioned in said testimony that might possibly cause a failure. That testimony merely indicated some of the things that *could* cause couplers to open, or come uncoupled, or had been learned to have caused uncoupling in other instances. There was no evidence that any such thing *did happen in this case.* In this, it differs from *New York C. & St. R. R. Co. vs. Affolder* (*USCA., 8th*) 174 *F. 2d* 486, in which there was evidence of the actual existence of more than one situation which could have caused the Pennsylvania car and the Rock Island car not to couple. It also differs from *Carter vs. Atlantic & St. A. B. R. Co.,* 338 *U.S.* 430, 70 *S. Ct.* 226, 94 *L. ed.* 236, in which there was a question of fact as to the causal relationship, or intervening cause, between the L & N car's failure to couple and the plaintiff's injury from pulpwood in its hold being pitched forward on him, when the switching train later coupled with it. Under the decisions of the Federal Courts and the United States Supreme Court, the failure of the subject couplers on Extra 102 North to remain coupled as this train proceeded down Rich Mountain from

North Switch was just as adequate proof of defendant's railroad's violation of the Safety Appliance Act as such couplers' failure to couple automatically by impact has been held to be in other cases. In this connection see *Cobb vs. Union Railway Company*, 318 *F.* 2d 33. These decisions are binding on this in cases coming under the Act (*Midland Valley Railroad Co. vs. Manios Okl.*, 307 *P.* 2d 545) as it was stipulated, and we have shown, this case does. In accord with them, we must therefore hold that the court committed no error in treating this case as one in which the defendant's liability for the collision was established, and in submitting to the jury only the questions upon which hinged the determination of the amount of plaintiff's recovery.

In additional argument under its "PROPOSITION III", defense counsel refer to portions of plaintiff's testimony as evidence that he "failed to properly inspect the train" in the hereinbefore mentioned "running inspection", and as evidence that "he failed to take proper precautions for his own safety when once warned that a break in the train existed." They complain that the trial court deprived defendant "of setting up contributory negligence even though evidence" of it was before the jury. They also complain of defendant's being "deprived of its allowable instructions of contributory negligence in keeping with the Carter case, infra, . . .".

We are not certain what counsel means by this statement that defendant was deprived of "setting up" contributory negligence. If counsel means that defendant was deprived of pleading contributory negligence, *the record does not reflect this,* because *it fails to show that defendant ever attempted to plead contributory negligence.* On the contrary, defense counsel appears to have recognized all through the proceedings in the trial court—just as did the defendant in *Chicago, Rock Island And Pacific R. Co. vs. Hawes, Okl.,* 424 *P.* 2d 6, 12, that contributory negligence is not a complete defense in cases of this class; and their reference to the Carter Case brings into focus the following language of the Court in that case (94 L. ed. 242):

> "The 'fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . ." 45 USCA., §43 FCA title 53 35 Stat. 66 ch. 149. The negligence of the petitioner and that of the railroad should have been submitted to the jury, and *in the light of this comparison* a verdict reached that would do justice to all concerned. See *Tiller vs. Atlantic Coast Line R. Co.,* 318 *U.S.* 54, 65, 87 *L. ed* 610, 616, 63 *S. Ct.* 444 1435 967 (1943)." (Emphasis added).

It is made doubly certain from the above that if the testimony, defendant refers to, did show any contributory negligence on the part of plaintiff in the matter of his injury, this would have demonstrated no error in the trial court's sustaining

plaintiff's motion for an instructed verdict on the matter of defendant's liability. But the last part of the above quotation from the Carter Case is obviously what counsel refers to in their complaint that defendant was deprived of its "allowable instructions . . .". Counsel surely know, however, that the "allowability", or propriety, of certain instructions in certain kinds of cases does not mean that courts commit reversible error if they do not give them. Here the record reveals no request by defendant for any instruction to the effect that plaintiff's damages should be diminished by the amount of negligence, if any, the jury found attributable to him; and, as far as the record shows, defendant's only objection to any of the court's instructions was expressed in the following general terms: "Now as to the instructions, we do object and except to the instructions . . . in light of the testimony that has gone before the jury, that they contain only partial instructions . . .". Here we have a situation analogous to the one in the Chicago, Rock Island And Pacific R. Co. Case, supra, where said Railroad Company defendant allowed that case to be submitted to the jury without any request for an instruction of the "present worth" of plaintiff's future damages, yet complained, on appeal, of the trial court's failure to give any such instruction. There, while recognizing that this Court had said that such instructions are proper where such damages are sought, we applied the rule that a request therefor is "a necessary predi-

cate" for consideration of such failure, or omission, when assigned as error on appeal. We think the same appellate rule should apply to defendant's complaint of the trial court's omission here, as well as to defendant's additional complaint, under its Proposition III, that the court gave its instructions numbered "2", "3", and "6", without telling the jury that plaintiff's recovery should be diminished because he had not undergone an operation suggested by one of his doctors. In accord with the foregoing, we hold that defendant's arguments under its first three propositions present no cause for reversal.

Defendant's arguments under its "PROPOSITION V" pertain to the manner in which the jury was selected to try the case. Its first complaint concerns selection of the panel as a whole. Of the total of 100 persons summoned for jury duty, only 38 appeared, and defense counsel moved to quash the panel on the ground that it was "not duly constituted according to statutory requirements . . .". Of these 38 persons, the 37th and 38th were a Mr. Anderson and a Mrs. Triplett. Defense counsel says that Mr. Anderson first entered the court room while the rest of the panel was being sworn, then he was sworn separately, and that Mrs. Triplett did not arrive there until shortly thereafter, and was also sworn separately. Counsel also says that when the clerk started selection from these thirty-eight persons, twelve of them to be seated and undergo voir dire examination, the first two names he called were those of Mrs. Triplett and Mr. Anderson, respectively. When

all twelve had taken their seats in the jury box, defendant made the following oral motion: " . . .. that the jury be quashed and asks that these jurors be returned to their seats . . .". Defendant's brief indicates that the ground for this motion, which the court overruled, was that it was obvious (from the fact that Mrs. Triplett and Mr. Anderson—the last two jury panelists to arrive—were the first two that the clerk called to the jury box) that the names of Mrs. Triplett and Mr. Anderson were not "properly distributed or shaken up with other jurors' names before (being) selected."

Defendant next complains that, after the voir dire examination of two other jury panel members, Mr. King and Mr. Jones, had indicated some doubt in their minds as to whether they could be fair in their deliberations on the case (if they, as jurors participated in returning a verdict therein) the court did not interrogate them as a predicate for excusing them from the jury for cause. Defendant also complains of having to use one of its peremptory challenges to cause a member of the jury panel named "Edward Killion" to be excused from jury service in the case.

In our opinion, there is no merit to any of defendant's complaints in which it mentions the above-named jury panelists. The record shows that, of these, Mr. King was excused for cause, and that Mr. Killion and Mrs. Triplett were both excused upon preemptory challenges of the defendant. The

fact that Mrs. Triplett did not serve as a juror renders inapplicable to defendant's argument concerning her, the case of *Kansas City Southern vs. Black, Okl.*, 395 *P.* 2d 416, which is the only authority cited in support of it.

Defendant's complaints concerning the selection of the general panel of 38 persons, from which the jury in this case was deprived, are no more serious than were the complaints of the same defendant in *Kansas City Southern Railway Co. vs. Norwood, Okl.*, 367 *P.* 722, in which the original panel, consisting of 75 persons, was reduced to 29 by the time that case was reached for trial. There, we recognized that under Tit. 38 O.S. 1961 §29, and the rule in such matters, a verdict will not be set aside on account of an irregularity in the selection of a jury, absent a showing of prejudice to the party complaining thereof, and that the burden of making such showing is on that party. While this case differs from *Carney vs. Chapman*, 60 *Okl.* 49, 158 *P.* 1125, in that, here, the defendant *used* all three of its peremptory challenges, thereby causing to be excused from the jury one J. A. Wasson, as well as Killion and Mrs. Triplett on principal, and from the standpoint of a showing of prejudice, we do not think there is any substantial difference between its position in this appeal and that of the defendant in the Carney Case. Of the five jury panelists mentioned in defendant's argument, Mr. Jones was the only one left on the jury when the trial commenced, whose impartiality appears to have ever been in doubt. This arose,

when, in plaintiff counsel's questioning of him on voir dire examination, Jones revealed that he was a retired former watchman and laborer for defendant, and, in answer to counsel's question as to whether he thought he "could listen to both sides and return a verdict that's fair without regard to your background of railroad experience", he answered: "Well, I don't know whether I could or not." The record shows that later in the jury's voir dire examination, counsel for defendant tested jones' possible bias by a rather searching and extensive interrogation, and apparently became satisfied with his qualifications. At that time, defendant had used none of its peremptory challenges and apparently never again had sufficient doubt about Jones' qualifications to challenge him. And, for all that the record shows, defendant's resurgence of interest in Jones' qualifications did not come about until after the substantial verdict against it was returned by the jury, of which Jones was a member. Under the principles applied in the above-cited cases, it is our opinion that defendant has failed to show it was prejudiced by any phase of the drawing, or empanelling, of the jury about which it now complains.

Under its PROPOSITION IV, defendant complains of the trial court's admission of irrelevant testimony concerning the length of the train, the fact that it was pulling heavy ore cars at its rear end, and that train separations on defendant's tracks had been more frequent since its trains had become so

long (than before, when they were shorter). Defendant is in no position to complain of the admission of such evidence as error. Although its counsel did object to the elicitation of such testimony from plaintiff, and another of his witnesses, on direct examination, the record shows that he elicited much of the same character of testimony himself, as evidenced by the following excerpt from the re-cross examination of plaintiff:

"Q Let me see if I have this straight—maybe it will help the jury too. As I understand it, back before you came back from the service in '45, the trains were only about 70 cars, and at that time there weren't as frequent separations or uncoupling—is that correct?

"A No, sir.

"Q But now—in the last few years I am talking about now —and since 1945 anyway—and let's take it up in the last two or three years before this accident occurred there are three times as many separations—would you tell the Court and jury the reason for that, please?

"A Well, it is these long trains in my opinion with the slack in them.

"Q Am I to be led to understand when you get a more severe slack out in the train it is likely to trip the couple itself?

"A I suppose it is possible.

"Q In fact it is quite common isn't it when the slack-out is run in and caused these separations, and when they start back out again they break in two?

"A We break in two. It has to be something to hit this pin to cause it to come up.

"Q You say a lot of times this occurs when you havn't had a broken couple, but you have found that something activated that pin?

"A Yes.

"Q And it is three to one now is it, than before?

"A Well, an estimate. It is a lot worse than when we had 70 car limit trains.

"Q So my words were "it is not uncommon?"

"A It does happen.

"Q And no switching operations are going on when these things happen?

"A No, sir.

"Q If it does happen it is the cause of this extra train, much longer length train, than used to be over the other trains along with other factors that might activate them along the road?

"A What was the question?

"Q The reason, one reason is the long length of the trains they are hauling now?

"A Well, it happens and didn't happen before, so evidently that would be the reason.

"Q So this must be one of the conclusions we reach—it is the long train or the kicking up of more things on the ground or more animals hitting them?

"A Yes.

"Q But not couplings or couples at a switching operation?

"A Yes.

"Q A passenger train is about how long on the Kansas City Southern?

"Q Six or seven cars."

It is obvious from some of the above quoted questions defense counsel asked plaintiff on re-cross examination that an attempt was being made to support defendant's theory that the train separation was due to causes other than defective couplers, and that separations from such causes were not uncommon or unusual (in contra-distinction to plaintiff's theory of absolute liability, and that the separation itself was evidence enough of defective couplers to make a prima facie case) and that the Safety Appliance Act did not apply since the separation did not occur in a switching operation. In *Blanchard vs. Gordon, Okl.*, 418 *P.* 2d 67S, we hold (3rd syll.):

> "Plaintiff in error on appeal may not rely upon certain testimony in an effort to establish an issue in his case and at the same time assert prejudicial error on account of the admission of such evidence by the trial court."

Our opinion in the above case contains an extensive quotation from *Fisher vs. Pugh, Okl.*, 261 *P.* 2d 181, a part of which is as follows:

> 'Most certainly it cannot be seriously urged by plaintiff that he is entitled to have such testimony considered for one purpose, but that the admission thereof must be considered erroneous for any other purpose. If the testimony objected to is to be held erroneous for one purpose, then it cannot be considered for any other purpose. Under no circumstances can plaintiff rely upon certain testimony in an effort to establish the issue in his case and then, in the same breath assert prejudicial error based upon the selfsame evidence. * * *.'."

See also *Republic National Life Insurance Co. vs. Chilcoat,* Okl., 368 P. 2d 821 (3rd syll.), *Dippel vs. Hargrave,* 260 Okl. 26, 240 P. 2d 1070, and *Chickasha Cotton Oil Co. vs. Hancock, Okl.,* 306 P. 2d 330, 336. In view of the foregoing, we must hold that defendant is in no position to assert error in plaintiff's counsel's elicitation of testimony concerning facts of the same general character as those about which defense counsel interrogated plaintiff.

Defendant's last complaint under its PROPOSITION IV is that the admission of such testimony had the effect of inciting "passion of the jury as to the general conduct and operation of the railroad . . . .". Since in cases where the defendant's liability is established, and there is nothing else to make it appear probable that the verdict was the result of the jury's passion or prejudice, such probability must be indicated by a showing that the evidence does not support a recovery as large as the one awarded—and defendant seems to recognize this in its last or 6th "PROPOSITION"—the foregoing complaint can be dealt with in conjunction with that proposition, which is as follows:

> "That the verdict is excessive appearing to have been given under the influence of passion or prejudice in the light of the evidence and not sustained by evidence sufficient for damages in this amount."

In argument under the quoted proposition, reference is made to testimony concerning a back injury plaintiff suffered in 1955 while working for defendant, to defendant's settlement with him for that, and his return to work. Defense counsel also again refers to the testimony about another operation being recommended on plaintiff's back and to the fact that no medical bills were introduced in evidence; and counsel characterizes the evidence as to his loss of earnings, pain and suffering, and disability as having been "mitigated by the doctor's testimony as to the relief expected by an operation and his then apparent ability to return to moderate work."

It is true that the undisputed evidence shows plaintiff had a back injury from being thrown out of a caboose seat in 1955, and, after being in traction in a Ft. Smith hospital "around a month", settled his claim with defendant for $4,692.00, plus sick benefits, raising this total to about $5,400.00, and plaintiff returned to work "about six months" later, but continued having to have his back in traction intermittently until he had a disk removed by a Ft. Smith orthopedic surgeon, Dr. S, in March, 1963. After a period of recouperation, plaintiff went back to work for defendant on June 8, 1962, after an examination by defendant's general surgeon in Kansas City. Plaintiff testified, however, that, after that time, and until the subject accident of March, 1963, he didn't "have any difficulty" doing his work, that he made more money at it than he ever had before, and that he didn't

have any time off on account of his back. He testified that as a result of his latest injury, his back, hip, right leg, and right testicle still hurt. It is undisputed that he has had no gainful employment since, and his testimony showed how his physical condition handicapped him in attempting to do simple chores like carrying water to his cattle and mowing his lawn. Plaintiff's testimony to the effect that, in this condition, he could not perform certain of the more strenuous tasks of a freight train conductor was corroborated, in a general way, by Dr. L, a Poteau examining physician for defendant, to whom plaintiff's attorneys referred him for a physical examination (including the taking of X-ray pictures) about two weeks before the trial.

Plaintiff admitted that Dr. S had expressed to him the opinion that another operation for his present back injury might be as successful as the previous one of 1962, and this was corroborated by direct testimony of Dr. L, except that the latter conditioned his opinion upon anticipated findings from a series of preoperative myelograms "to prove you are on the right track." Dr. L. testified that removal of an additional disk from plaintiff's back would need to be preceded by a laminectomy "to make a position to remove and treat this injured disk." When asked to what extent plaintiff is disabled, Dr. L testified:

> "I feel until some definite treatment is had upon him he is disabled to do any type of operation or unable to do any more than look after himself."

Dr. L. further testified concerning plaintiff:

> "I think there is a chance he might be rehabilitated with surgery to where he could do moderate, reasonable things, but I feel his history, how he had gotten along in the past would preclude him to be, say as good as new."

Plaintiff testified that, at the time of the subject accident, he was earning $750.00 per month, and his W-2 (income tax) forms for recent years, introduced in evidence, tend to support this testimony. Since there seems to be little doubt, from the evidence, that plaintiff is permanently and totally disabled from continuing the work he has done for many years (unless an operation may relieve him of all, or a part, of this disability) the total recovery he sought of $200,000.00 might, by multiplying his agreed life expectancy of 28.67 years by the amount of his annual salary, be attributed solely to loss of future earnings and earning capacity, without consideration of any past, or future, pain and suffering. (In connection with the latter element of damages, see *Chicago, Rock Island and Pacific Railroad Co., vs. Hawes, supra*). But the jury's verdict was for several thousand dollars less than half of that amount, and does not appear to be exorbitant or unconscionable so as to suggest, in itself, that it was the result of passion and/or

prejudice on the part of the jury. See *Stevens vs. Schickendanz,* Okl., 316 P. 2d 1111 (2nd syll.). As indicated in *Brady vs. Tipton,* Okl., 407 P. 2d 194, 205, "since the verdict is general . . . (it) furnishes no clue as to the size of its allowance for any of plaintiff's alleged damages . . . .". Defendant cites no authority in support of its argument that plaintiff's 1955 injury and his settlement with defendant in connection therewith, and/or the testimony concerning the likelihood of his condition being improved by another operation, should be considered in determining whether or not the verdict and judgment in his favor is excessive. Thus, in this respect, defendant has failed to discharge its burden in this appeal. See *Phillips vs. Ladd,* Okl., 399 P. 2d 501, and *East Basin Oil & Uranium Co. vs. Pound,* Okl., 321 P. 2d 694. It is not the duty of this court to discover some legal theory, or basis, upon which judgments of trial courts may be reversed or modified on appeal.

As we have determined that none of the assignments of error adequately presented by defendant constitute sufficient ground for reversal of the trial court's judgment, said judgment is hereby affirmed. All the Justices concur.

PETITION FOR REHEARING BY DEFENDANT RAILROAD and AMENDMENT TO PETITION FOR REHEARING:

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
a Corporation,

Plaintiff In Error,
No. 41569

VERSUS

PAUL JOHNSTON,

Defendant In Error.

PETITION FOR REHEARING

Defendant in Error, Paul Johnston, obtained a judgment in the District Court of LeFlore County against Plaintiff in Error on an action based fully under the Safety Appliance Act, i.e., the Act directed to the couplers under 45 USCA, paragraph 2:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

This Court in an opinion of May 29, 1967, prepared by a single assigned Judge is not only erroneous but totally fails to consider evidence as to the relationship of the occurrence of this accident and cases of precedent.

The only question which was passed on in the opinion is that a train in transit and not engaged in switching operations, with injuries resulting to a trainman, by the uncoupling of the train that it is an action properly brought under the Safety Appliance Act.

The reason this becomes so important as a case of first impression in this state as well as in any other state insofar as our research has developed, is that the mere bringing of an action under the Safety Appliance Act by an injured employee removes any burden of proof on him of any show of negligence, and eliminates any show of comparative or contributory negligence by the defendant.

This appeal is lodged and this Petition for Rehearing is requested for the purpose of preventing future actions to be brought under the Safety Appliance Act when in fact the proximate cause of an accident had nothing to do with the purpose for which the Safety Appliance Act was designed.

Also, as to whether or not this becomes a jury question where facts are submitted in evidence to reasonably raise a question of what caused the occurrence, is again of prime importance in this opinion.

The opinion refers to the Gotschall case (*Gotschall vs. Minneapolis & St. Louis Railroad Company* reported in 147 NW Reporter 430, 153 NW Reporter 120, and 244 US 66, 375 S. Ct. 598, 61 L. ed. 995).

We respectfully differ with the opinion wherein it is stated that this train was in transit and "that trip was not a switching operation". A review of the NW Reporters and the U. S. would certainly indicate that this was in a switching operation at the town of Jordan, Scott County, Minnesota. This being an intermediate stop, that the brakeman had gotton off, and after coupling of cars started to walk on top of the cars back to his position when emergency brakes and a sudden jerk threw Gotschall off the train and he was found lying partly inside and partly outside the rails. It does not state whether the train is still in the switch yards of Jordan or had just left Jordan but nevertheless it was from a switching operation which Gotschall had only moments before been engaged in.

Nevertheless, this case was submitted to the jury and the United States Supreme Court held with favor the State Supreme Court's comments as follows:

> "We still think that, even with this evidence, the question of defendant's negligence was properly for the jury." (underline ours)

The very essence of that case relied on by plaintiff in their brief restates the proposition that a jury question did arise and it was properly submitted to a jury wherein this Plaintiff in Error was deprived of a jury deliberation of the very issues which made up the question of what caused the train to separate.

The opinion attempts to deliberate the question of negligence and of causes and whether or not a proper showing was made of causation which entirely defeats the premise upon which plaintiff brought his original action, i.e., the Safety Appliance Act. If the Safety Appliance Act only applied, there is no need of any other cause being shown or any negligence either inferred or proven and the theory of res ipsa loquitur to be applied. It being understood that res ipsa loquitur is in itself an action in negligence, the question being a rule of evidence only and the question shifts to defendant in the proof of negligence (*Carter Oil vs. Independent Tarp Co.,* 232 P. 419). These have no part of the Safety Appliance Act per se.

The opinion further states that the plaintiff relies very heavily upon the case of *O'Donnell vs. Elgin, Joliet & E. R. Co.,* 338 U.S. 384, 70 S. Ct. 200, 94 L. ed. 187. We thoroughly agree that plaintiff does rely strongly on this case and we look to this case and first find that therein a jury did make a finding of facts for the plaintiff. It was submitted to the jury.

We also find under Syllabus No. 8 page 206:

> "As to the claim based on the Safety Appliance Act, we hold that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act, which rendered defendant liable for injuries - -."

There can be no question but what this was a switching operation, the very purpose of the Safety Appliance Act having to do with couplers was to "couplers coupling automatic by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." (45 U.S.C.A., Par. 2)

This opinion seeks to place any and all accidents which may arise from couplers under the Safety Appliance Act. If this opinion is allowed to stand any time an accident occurs and a coupler is either found broken or a possible causation of the accident, whether a train is involved in switching operations or not or in transit, the only question will be of damages and this only to be submitted to the jury. This is not the purpose nor the intent of the Federal Employers Act and the Safety Appliance Act supplementary thereto.

We respectfully submit that this cause be reheard by this Honorable Court, that this record be examined and that the judgment of the District Court of LeFlore County be reversed and this be remanded for trial on its merits on the question of causation and contributory negligence.

WATTS, LOONEY, NICHOLS & JOHNSON
Respectfully submitted
BY .....
Burton J. Johnson
219 Couch Drive
Oklahoma City, Oklahoma
Attorneys for Plaintiff In Error

A copy of the foregoing Petition for Rehearing was mailed this 9th of June, 1967, to Varner & Miller, Poteau, Oklahoma, attorneys for Paul Johnston.

Burton J. Johnson

IN THE SUPREME COURT FOR THE STATE OF OKLAHOMA

No. 41569

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

VERSUS

PAUL JOHNSTON,

Defendant in Error.

AMENDMENT TO PETITION FOR REHEARING

Plaintiff in Error for further appeal to this Court for rehearing would show that it has been deprived of its rights granted by the Constitution of the United States; Amendment VII wherein it grants the following:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

This petitioner was deprived of its rights to trial by jury of the vital question involved in the litigation pending under the Federal question effecting Federal Employers Liability Act.

Respectfully submitted
WATTS, LOONEY, NICHOLS & JOHNSON

BY .....
Burton J. Johnson
219 Couch Drive
Attorneys for Plaintiff in Error.

Acopy of the foregoing Amendment to Petition for Rehearing was mailed this 26th day of June, 1967, to Varner & Miller, Poteau, Oklahoma, attorneys for Paul Johnston.

.....
Burton J. Johnson

PETITION FOR REHEARING BY DEFENDANT RAILROAD and AMENDMENT TO PETITION FOR REHEARING:

ORDER OF SUPREME DENYING PETITION FOR REHEARING:

Filed
In Supreme Court
of Oklahoma

June 27, 1967

ANDY PAYNE, Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, June 27, 1967

THE CLERK IS HEREBY DIRECTED TO ISSUE THE FOLLOWING ORDERS:

41569—Kansas City Southern Railway Co. vs. Paul Johnston,

Petition for Rehearing Denied.

Floyd L. Jackson
Chief Justice

APPLICATION FOR LEAVE TO FILE SECOND PETITION FOR HEHEARING:

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 41569

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

VERSUS

PAUL JOHNSTON,

Defendant in Error.

APPLICATION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

COMES now the Plaintiff in Error and respectfully shows that heretofore on the 29th day of May, 1967, an opinion and decision of this Court was entered sustaining the verdict of the trial court of LeFlore County, Oklahoma, said verdict in favor of the Defendant in Error.

Thereafter on June 9, 1967, this Plaintiff in Error filed in said cause its Petition for Rehearing, which was by this Court denied on June 27, 1967.

That on the 26th day of June, 1967, this Plaintiff in Error filed an Amendment to the Petition for Rehearing which due to the time filed and the Order of this Court of June 27, 1967, this Honorable Court did not have said Amendment for its consideration.

WHEREFORE, Plaintiff in Error prays for leave to file its Second Petition for Rehearing, copy of which Petition is attached hereto.

LEAVE IS HEREBY GRANTED
TO FILE THIS 29 DAY OF JUNE,
1967

Floyd L. Jackson, Chief
Justice.

Respectfully submitted

WATTS, LOONEY, NICHOLS & JOHNSON
BY .....
Burton J. Johnson

219 Couch Drive
Oklahoma City, Oklahoma
Attorneys for Plaintiff in Error

A copy of the foregoing Application has been mailed this 29 day of June, 1967, to Varner & Miller, Poteau, Oklahoma, attorneys for Paul Johnston.

ORDER OF COURT DENYING SECOND PETITION FOR REHEARING:

Filed
In Supreme Court
of Oklahoma
July 18, 1967

ANDY PAYNE, CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, July 18, 1967

THE CLERK IS HEREBY DIRECTED TO ISSUE THE FOLLOWING ORDERS:

41569—Kansas City Southern Railway Co. vs. Jaul Johnston
Second Petition for Rehearing Denied.

Floyd L. Jackson,
Chief Justice.

PETITIONER'S NOTICE OF PETITION FOR CERTIORARI AND APPEAL TO UNITED STATES SUPREME COURT:

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

VERSUS

PAUL JOHNSTON,
Defendant in Error.

NOTICE OF PETITION FOR CERTIORARI AND APPEAL TO THE SUPREME COURT OF THE UNITED STATES

No. 41,527

1. Notice is hereby given that Kansas City Southern Railway Company, plaintiff in error herein, hereby gives notice of appeal to the Supreme Court of the United States, from the judgment decision and opinion of the Supreme Court of the State of Oklahoma, entered in this case on May 29, 1967, and the Order and Judgment entered denying Petition for Rehearing herein on June 27, 1967, and the Order and Judgment entered denying Application for Leave to File Second Petition for Rehearing on July 19, 1967.

2. This appeal is taken pursuant to Title 28, U.S.C. Sections 1257 and Section 2101 (c), (f), and Amendment XIV, Section 1, Constitution U.S.C. Amendment XIV, page 288, Amendment VII to the Constitution found under Constitution Amendments U.S.C., page 134, and Rules 10, 11, 12, 19, 21, 22 and 23 of the Supreme Court of the United States.

3. The Clerk of the Court will please prepare a transcript of the entire record herein for certiorari and transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) Petition in Error

(b) Copy of the Case-Made in the proceedings in the lower court containing 282 pages and certificates.

(c) Copy of Opinions of this Court in this case filed May 29, 1967.

(d) Copies of the Briefs of the plaintiff in error and defendant in error.

(e) Plaintiff in error's Petition for Rehearing, Amendment to Petition for Rehearing and plaintiff in error's Application for Leave to File Second Petition for Rehearing.

PETITIONER'S NOTICE OF PETITION FOR CERTIORARI AND APPEAL TO UNITED STATES SUPREME COURT:

The following questions are presented by this appeal:

1. Whether plaintiff in error was denied due process in violation of the Fourteenth Amendment to the Constitution and deprived of the right to trial by jury in violation of

Amendment to the Constitution and deprived of the right to trial by jury in violation of Amendment VII to the Constitution of the United States.

2. Where it is important to a correct and uniform application of the Federal Employer's Liability Act in State and Federal courts and

3. When a state jury system requires a jury finding that the United States Supreme Court will examine record and reverse judgment if evidence is insufficient as a matter of law.

WATTS, LOONEY NICHOLS & JOHNSON

BY .....

Clyde J. Watts

219 Couch Drive

Oklahoma City, Oklahoma

Attorneys for Plaintiff in Error

This is to certify that on the 14th day of August, 1967, a true and correct copy of the above and foregoing Notice of Petition for Certiorari and Appeal to the Supreme Court of the United States was mailed to Varner and Miller, Poteau, Oklahoma, attorneys for defendant in error, with postage fully prepaid.

.....

Clyde J. Watts

ORDER OF OKLAHOMA SUPREME COURT ISSUING MANDATE BUT STAYING ENFORCEMENT THEREOF AND ORDER OF SUPREME COURT CORRECTING DATE FOR PERFECTION OF APPEAL:

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

41569

KANSAS CITY SOUTHERN RAILWAY,

Plaintiff in Error,

VERSUS

PAUL JOHNSTON,

Defendant in Error.

ORDER ISSUING MANDATE BUT STAYING ENFORCEMENT THEREOF

This cause is reached for consideration, on the motion of plaintiff in error, to stay mandate pending the disposition by the Supreme Court of the United States of America of the Petition for Writ of Certiorari filed before said Court by the plaintiff in error.

IT IS HEREBY ORDERED that the mandate issue and further that the enforcement of the same in the trial court be stayed until August 29, 1967, pending the perfecting of an appeal by the plaintiff in error to the Supreme Court of the United States of America. If such appeal shall stand perfected on or before August 29, 1967, enforcement of the mandate of this Court shall be further stayed until such time as the Supreme Court of the United States of America shall have rendered a final decision therein, or pending further order of this Court.

The stay hereby ordered shall be conditioned nevertheless upon the giving within ten days from this date, an undertaking to be approved by the Chief Justice of this Court, in the penal sum of One Thousand and 00/100 Dollars ($1,000.00), conditioned upon the payment by the plaintiff in error of all costs, interest, and damage for delay should the appeal of the plaintiff in error be not applied for, denied, dismissed, or judgment against plaintiff in error be affirmed in whole or in part. This undertaking shall be in addition to the supersedeas bond now in effect in the District Court of LeFlore County, State of Oklahoma.

.....

Floyd L. Jackson, Chief Justice..

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

VERSUS

PAUL JOHNSON,
Defendant in Error.

No. 41569

ORDER AMENDING DATE FOR PERFECTION OF APPEAL

This cause is reached for consideration on Application of plaintiff in error to change date for appeal to the Supreme Court of the United States of America from August 29, 1967, to September 25, 1967.

IT IS THEREBY ORDERED that the Order of August 16, 1967, of this Court stating the date to be August 29, 1967, is hereby amended to read September 25, 1967.

.....

Floyd L. Jackson, Chief Justice

APPENDIX C

PORTIONS OF RECORD

TESIMONY OF PAUL JOHNSTON (R. 65)

Q. Did you make an inspection of the train just before you left Rich Mountain to go down it?

A. Yes, we did.

Q. Tell how you made the inspection.

A. We pulled the train by, the brakeman was on one side and I was on the other. We pulled the whole train by.

Q. Where were you standing with reference to the railroad tracks?

A. Just a few feet off from the clear—from the main line. (R. 66)

Q. You mean to say you stood still and the train moved or did you walk along beside the train?

A. We stood still and we pulled the train by real slow.

Q. Did you see all the train?

A. Yes.

Q. Is this the usual and customary way to inspect a train?

A. Yes, sir.

Q. About how long was the train?

A. 124 cars and a caboose.

Q. How many engines?

A. Seven engines, seven units.

Q. Seven—what kind of units? (R. 61)

A. Diesel.

Q. Tell the jury about how long a train like that is, seven units and 124 cars and a caboose. Is it a quarter a mile, half a mile or what?
Objections

A. It was over a mile long.

Q. Where were you on the train?
(R. 68)

A. On the caboose.

Q. When did you get on the caboose?

A. At Rich Mountain.

Q. Yes.

A. At the north switch when he pulled the train by.

Q. How long after you inspected the train was it you got on the caboose?

A. Just when the caboose came by we got on it. We inspected the caboose itself when it came by.

Q. Tell the jury whether or not when you got on the train, the train was coupled together and moving down the mountain.

A. Yes, it was coupled together and moving down the mountain.

Q. About how far did you go down the mountain before anything unusual happened?

A. Well, about four miles.
(R. 70)

Q. What did you first hear over the radio when you were coming in to Howard?

A. I heard the conversation—somebody said "Try to get that head-end out of the way, the caboose and about 30 cars is broke off back here and it looks like they are going to run into the head-end."
(R. 71)

Q. What other message did you hear?

A. I heard somebody tell us "You better get braced, looks like we are going to run into the head-end of the train." (R. 73)

Q. What is the weight of those ore cars?

A. Well, the ore cars run about 75 tons or 80-loaded.

Q. Do you know how many cars of ore there were?

A. No, I don't exactly. (R. 95)

Q. How fast were you coming down?

A. Running from 45 to 40 miles an hour.

Q. Was there any switching operation between those two periods of time?

A. No.

Q. How far in distance—

A. About six miles from Rich Mountain to Howard.

Q. And to the best of your knowledge there was no switching done from the time that you had stopped and made an inspection on the west side of the train and Mr. Duncan had made the inspection on the east side of the train and had boarded the train and traveled about six miles to the best of your knowledge there has been no switching operations made by you or any of your crew.

A. No, not when we got on the mountain. (R. 96)

Q. And this was when you got on the caboose and had made inspection?

A. Yes.

Q. Mr. Johnston, as you are operating a train on the track from Mena on up through DeQueen, Howard, Heavener—especially through in this area, it isn't uncommon for it—say a pin lever to become activated from various causes that will cause a couple to come uncoupled? (R. 100)

A. It happens.

Q. And it is not caused by switching operations—and it is not caused by any coupling operations, it it? It is just in the regular movement of the train?

A. It is something that's got to cause it uncoupled.

Q. Such as something hitting the lever or maybe a hose breaking and the hose slipping up and hitting the pin?

A. It could possibly do it—something fall off a car. (R. 101)

Q. Something to be flipped up from the railroad bed—many of these things could cause it?

A. Yes.

Q. Has this happened more frequently during the last years of your service than the first years of your service?

A. Definitely.

Objections

Q. How much more often during the later years of your service would this happen than the first years of your service?

A. I would say three times as often as it did on 50 to 70 car trains.

Q. When you first started working how long was the longest train you had on the railroad? (R. 103)

A. Well, 70 cars would be a big train.
Objections

Q. How long were the trains when you first started working?

A. 70 cars was a big train.

Q. Were they pulled by diesels then?

A. No, sir.
(R. 104)

Q. What was the tonnage that could be pulled over the mountain about 1950?

Objections

A. Around 3000 tons was a double-header—a big train.

Q. Has it increased since then?

A. Yes.

Q. What's the limit now?

A. Well, there doesn't seem to be any limit any more on what they can pull down there.

Q. What were they pulling that day that you got hurt?
Objections
(R. 107)

Q. In fact it is quite common isn't it when the slack-out is run in and caused these separation, and when they start back out again they break in two?

A. We break in two. It has to be something to hit this pin to cause it to come up.

Q. You say a lot of times this occurs when you haven't had a broken couple, but you have found that something activated that pin?

A. Yes.

Q. And it is three to one now is it, than before?

A. Well, an estimate. It is a lot worse than when we had 70 car limit trains.

Q. So my words were "it is not uncommon?"

A. It does happen.

Q. And no switching operations are going on when these things happen?

A. No, sir.

WITNESS DUNCAN (R. 134)

Q. Mr. Duncan, you had just inspected the train six miles back or roughly six miles back, you and Mr. Johnston both, is that correct?

A. Yes.

Q. You was the one on the east side and Mr. Johnston on the west side made inspection of this train as it was coming north?

A. Yes, sir (R. 135)

Q. You had your inspection back up here?

A. Yes.

Q. At that time the train was all coupled and all functioning properly and you got back on and you were in the movement of the train on to the next town?

A. Yes.

Q. There were no switch operations in this area, any coupling or uncoupling of any kind requiring you or Mr. Johnston to get off and do any of these operations?

A. No, sir.
(R. 136)

Q. Now when you went out of the car you went down to see a first separation three cars up between a car and a car ahead of it—some three cars ahead of the caboose—you found a separation?

A. Yes, sir.

Q. Mr. Duncan, had the air hose separated?

A. The whole train was separated about three car lengths.

Q. They were separated—had the air hose parted—the couplings parted?

A. They separated.

Q. The knuckles were apart?

A. Yes, sir.

Q. And the air hoses were apart?

A. Yes, sir.

Q. What caused that?

A. I don't know.
(R. 137)

Q. Now, you walked on down then to about 25 cars—something like that we will call that the one closer to the head end of the train—and you found another break between the trains?

A. No, sir.

Q. What did you find there?

A. I found two air hoses uncoupled.

Q. How about the train cars, sir?
(R. 138)

A. They were coupled together—both pins were down.

Q. They were back together?

A. Yes, sir.

Q. Can you explain to the court and jury now what the conditions of those knuckles—the air hoses were down —they were just loose?

A. Yes, sir.

Q. The knuckles were together were they not, sir?

A. Yes, sir.

Q. And they were coupled where you found them down there?

A. Yes, sir.

Q. Now, that indicated to you did it not that that is the separation that the train on the siding had radioed to you about of being separated some 50 to 75 feet and this was a run-in and the knuckles had gone back together and coupled?

A. Yes, that's correct.
(R. 139)

Q. Of course the hoses don't go back together, you have to hook them back together?

A. Yes, sir.

Q. Would it not be fair then, Mr. Duncan, if these knuck les were coupled together that one or both of them had

Q. Would it not be fair then, Mr. Duncan, if these knuckles were coupled together that one or both of them had to be opened in order for them to run back in and couple?

A. Yes.

Q. So that the operation of that train at that location had to have been made and initiated, that is the operation of that train had to be initiated by one of the couplers being uncoupled—activated?

A. Yes.

Q. So that one coupling had to have been tripped or activated in order for it to come back together and recoupled on impact?

A. Yes.

Q. Is it not true, sir, that you find several occasions of uncoupling of a train by the bottom pin lifters that are hit —an air hose could swing across it and hit this pin— an animal could hit this pin—something could have slipped up by the wheels and activated that where the knuckle opened, pulled the hose loose and separate the train?

A. It happens. (R. 140)

Q. Isn't that a logical conclusion—this pin jumped up and caused the separation of the train?

A. I don't know—I didn't see it.

Q. I know you didn't but from your experience isn't that a logical conclusion?

A. It could have.
(R. 141)

Q. Mr. Duncan I am interested—what does cause this pin to jump up—you said not an animal—I should have said foreign object?

A. We just suppose something like that could happen.

Q. You don't see it happen but that's the only explanation you have that had caused the pin to jump?

A. They do come up, yes, sir.

Q. There is a lot of factors that do make them come up?

A. Yes, sir.
(R. 142)

Q. You don't see those things happen?

A. These might happen in the middle of a 150 car train, but you don't see them happen.

LONNIE R. MALONE

(R. 164)

Q. And what is your business or profession?

A. Car foreman for the Kansas City Southern Railroad Company.

Q. How long have you been so employed?

A. 16 years.

Q. Do you have an opinion as to what causes the separation and movements of cars in movement of trains?
(R. 165)

A. Yes, sir.

Q. I will ask you, sir, if you will, explain to the court and jury what can cause a separation of a train as to a coupler?

A. Well, some object can strike it underneath—the lock pin, causing it to raise and the couple to open allowing the cars to separate, and—

A. It could be a piece of a tie, a rock—large rock—angle bar—something of that nature.

Q. Something onto the railroad track bed or picked up by a wheel?

A. Yes, sir.
(R. 166)

Q. If this pin lifter is on the rear of the car, the car going in this direction the pin lifter would be to the rear, which direction would the pin lifter handle be moved to open the pin?

A. It would be moving further toward the rear.

Q. If anything hit it from the front it would push the handle to the rear and activate the pin?

A. Yes.

Q. What other things activate the pin?

A. Air hoses or air hoses becoming uncoupled in some manner in the train, the glad hand holder.
(R. 167)

Q. Are there other things would cause a pin to become disengaged?

A. Yes, rough track causing the cars to bounce up and down causing this pin to raise.
(R. 170)

Q. Did you investigate how the coupler got down on the tie?

A. We didn't assume it got down on the tie, we would assume a piece came up and hit the lock lifter.

Q. What did you observe that made you think of rocks?

A. Something of a similar kind—we could see rock dust, or think was rock dust, on the lifting mechanism of the couplers.
(R. 171)

Q. How would an angle bar get up there?

A. It could be flipped there by a wheel, if there was an angle bar on the track.

Q. Do you think it is possible to carry seven engines and 90 cars and the next car flip a rock up and hit?

A. Yes, sir.
(R. 172)

Q. So 124 cars and seven engines would go across this place on high rails as much as seven or eight inches above the ballast and 100 cars go across and you think the 101 might pick up a rock?

A. I think it is possible.

Q. Or an angle bar?

A. Yes.

Q. Or you think an air hose may have done it?

A. I think it could.

(R 176 MOTION FOR DIRECTED VERDICT

Comes the plaintiff and moves the court to instruct the jury that under the evidence as presented the defendant railroad is liable for whatever damages the plaintiff may have sustained, and to further instruct the jury on the question of proper measure of damages and to submit the case to the jury on that question alone, for the reason that under the Safety Appliance Act the defendant railroad company is required to equip its cars with couplers which will remain coupled while the train is moving and that no amount of care on the part of the defendant railroad can excuse it of this obligation, and under the evidence as thus far presented the railroad is clearly responsible.

BY THE COURT: The Court sustains the motion of the plaintiff for a directed verdict.

(R. 176) MOTION FOR DIRECTED VERDICT

To which the defendant excepts, calling the attention of the court that we preclude by such a direction of verdict any deliberation on the part of the jury on questions which have been placed before the jury at the present time all matters such as the length of train, load distribution consisting of the make of train and does not now permit the jury to pass on the question as to whether or not an intervening cause of some independent cause may have been the effect of the separation of the train complained of. And further that in all the testimony by plaintiff and defendant conclusively show no switching operations either prior thereto or at the time of said separation so as to make the Safety Appliance Act of the coupler act apply, and respectfully moves the court to re-consider in the light of O'Donnell, Carter, and Affolder cases, found in 70 Supreme Court.

BY THE COURT: Overruled.